

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 FOR THE COUNTY OF LOS ANGELES  
3 DEPARTMENT NO. 324 HON. ERNEST M. HIROSHIGE, JUDGE

4 BUNKER HILL TOWERS CONDOMINIUM )  
5 ASSOCIATION, ETC., ET AL., )  
6 PLAINTIFFS, )  
7 VS. ) NO. C 638 821  
8 THE PRUDENTIAL INSURANCE )  
9 COMPANY OF AMERICA, ET AL., )  
10 DEFENDANTS. )

11 REPORTER'S DAILY TRANSCRIPT  
12 APRIL 2, 1992 - A.M. SESSION

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1 LOS ANGELES, CALIFORNIA \* MONDAY, APRIL 6, 1992  
2 DEPARTMENT NO. 324 HON. ERNEST M. HIROSHIGE, JUDGE  
3 10 A.M.

4 (THE FOLLOWING PROCEEDINGS WERE HELD IN  
5 OPEN COURT OUT OF THE PRESENCE OF THE  
6 JURY:)

7 THE COURT: ALL RIGHT. WE'RE READY TO COMMENCE  
8 OUTSIDE THE PRESENCE OF THE JURY. THERE WERE TWO POINTS  
9 AND AUTHORITIES SUBMITTED REGARDING THIS WITNESS. HOW  
10 SOON ARE WE GOING TO GET TO THIS ISSUE?

11 MR. BOUCHER: WE'RE ACTUALLY IN THE THICK OF IT  
12 NOW, YOUR HONOR.

13 THE COURT: WELL, WEREN'T YOU GOING THROUGH SLIDES?  
14 MR. BOUCHER: THAT'S CORRECT.

15 THE COURT: ARE YOU THROUGH WITH THE SLIDES?  
16 MR. BOUCHER: WE HAVE GOT SOME ADDITIONAL SLIDES,  
17 SOME OF WHICH IN PART GO DIRECTLY TO THIS POINT. I ASKED  
18 SOME GENERAL QUESTIONS DURING THE SLIDE PRESENTATION, AS  
19 THE COURT MAY RECALL, AND MR. MANFREDI OBJECTED ON  
20 HEARSAY GROUNDS TO JUST GENERAL BACKGROUND QUESTIONS.

21 AND THE COURT ASKED THAT I GO ON TO ANOTHER TOPIC, WHICH  
22 I DID, AND I STOPPED THE SLIDES AT A POINT WHERE THERE  
23 ARE A COUPLE OF MORE I THINK THAT WE CAN GO THROUGH.

24 BUT CERTAINLY SOME OF THESE, SOME OF THE  
25 REMAINING SLIDES GO DIRECTLY TO AT LEAST PART OF THIS  
26 POINT OR AT LEAST THE BREADTH OF THE POINT IN TERMS OF  
27 THE WAY THE DEFENSE, AS I UNDERSTAND IT, IS ARGUING.

28 THE COURT: WELL, WEREN'T YOU TRYING TO GO INTO THE

1 ISSUE OF IDENTIFYING MONOKOTE-3, HIS PAST EXPERIENCES  
2 WHERE HE'S TAKEN DUST SAMPLES AND IT HAS BEEN ANALYZED IN  
3 OTHER CASES?

4 MR. BOUCHER: THAT'S CORRECT.

5 THE COURT: AND IT'S PROVED TO BE MONOKOTE-3?

6 MR. BOUCHER: THAT'S CORRECT.

7 THE COURT: I THINK THAT IS A DISTINCT ISSUE FROM  
8 THE OTHER ISSUE HERE, THE ISSUE THAT WE HAVE AS TO  
9 WHETHER OR NOT THE LAB RESULTS IN THIS CASE COME IN FOR  
10 THE TRUTH OF THE MATTER, WHICH IS MY RECOLLECTION OF WHAT  
11 THE ISSUE WAS, I THINK, ON THE ISSUE OF HIS BEING ABLE TO  
12 BE FAMILIAR WITH MONOKOTE-3 AND BEING ABLE TO IDENTIFY IT  
13 AND ITS PROPERTIES.

14 THE FACT THAT IT IS ANALYZED IN OTHER CASES  
15 AND HE'S FAMILIAR WITH THE PROPERTIES, WHAT IT LOOKS  
16 LIKE, WHAT IT FEELS LIKE, AND IT WAS LATER IDENTIFIED,  
17 THAT COULD BE RELEVANT TO HIS EXPERTISE ABOUT RECOGNIZING  
18 CERTAIN CHARACTERISTICS OF MONOKOTE-3. BUT IN THIS CASE  
19 ITSELF THERE IS A DIFFERENT ISSUE AS TO WHETHER OR NOT WE  
20 GET THE LAB RESULTS IN FOR THE TRUTH OF THE MATTER THAT  
21 IT IS MONOKOTE-3 OR THAT A PERCENTAGE OF ASBESTOS IS X.  
22 THAT SEEMS TO BE THE DIFFERENT ISSUE, TO ME.

23 MR. BOUCHER: WELL, I WOULD AGREE WITH THE COURT  
24 ESSENTIALLY. HOWEVER, YOUR HONOR, I THINK THAT THERE ARE  
25 TWO ISSUES IN TERMS OF THE QUESTIONING HERE -- ONE OF  
26 WHICH WE BELIEVE IS VERY CLEAR AND THE SECOND OF WHICH  
27 THE COURT HAS JUST IDENTIFIED -- THE FIRST BEING, CAN  
28 THIS EXPERT, MR. HATFIELD, WHO TOOK THE DUST SAMPLES,

1 RELY UPON THE MILLETTE REPORT IN RENDERING HIS OPINION  
2 THAT THERE IS IN FACT CONTAMINATION, NOT ONLY BASED UPON  
3 THE REPORT ITSELF BUT ON HIS PRIOR EXPERIENCE AND  
4 ANALYSIS THAT HAS BEEN PERFORMED IN OTHER CASES THAT HE'S  
5 BEEN INVOLVED IN?

6 THAT IS ONE QUESTION THAT WE BELIEVE  
7 CLEARLY HE'S PERMITTED TO GO THAT FAR. THE EVIDENCE CODE  
8 INDICATES THAT AN EXPERT CAN RELY UPON EVIDENCE, WHETHER  
9 OR NOT IT IS ADMISSIBLE, IN RENDERING THEIR OPINIONS. SO  
10 IN TERMS OF HIM BEING ABLE TO TESTIFY THAT HE TOOK SOME  
11 TESTS, DID SOME DUST SAMPLING, HAD THAT ANALYZED, AND  
12 BASED UPON THAT ANALYSIS, AS WELL AS HIS BACKGROUND AND  
13 EXPERIENCE, HE FEELS THAT THIS PLACE IS CONTAMINATED, WE  
14 DON'T THINK THERE IS ANY QUESTION THAT HE CAN GO THAT  
15 FAR.

16 THE NEXT QUESTION BECOMES, DO THE RESULTS  
17 FROM THE MILLETTE LAB COME INTO EVIDENCE FOR THE TRUTH OF  
18 THE MATTER, THAT IS, WHAT THE ACTUAL RESULTS SHOW, AS  
19 OPPOSED TO JUST COMING IN AS THE BASIS FOR SOME OF HIS  
20 OPINIONS RELATING TO CONTAMINATION? AND THAT IS I THINK  
21 WHAT IS ADDRESSED BY THE BRIEFS THAT WE PUT FORTH.

22 OUR UNDERSTANDING OF -- AND OBVIOUSLY MR.  
23 MANFREDI CAN SPEAK TO IT BETTER THAN I -- BUT OUR  
24 UNDERSTANDING OF THE DEFENSE OBJECTION IS THAT THEY DON'T  
25 FEEL THEY HAVE AN OBJECTION TO ANY TESTIMONY BY MR.  
26 HATFIELD ABOUT THE CONTAMINATION OR EVEN THE FACT THAT HE  
27 HAD THESE RESULTS ANALYZED, AND THAT HE BASED HIS  
28 OPINIONS IN PART UPON THESE RESULTS.

1                   AND SO I THINK THAT THERE ARE TWO SPECIFIC  
2 ISSUES BEFORE THE COURT.

3                   THE COURT: WELL, ON THE ISSUE OF WHETHER OR NOT  
4 HIS PREVIOUS EXPERIENCE WITH MONOKOTE-3 INVOLVED HIS  
5 OBSERVATIONS OF THE PRODUCT UNDER VARIOUS CONDITIONS  
6 PHYSICALLY, AND OBSERVING ITS PROPERTIES, PHYSICAL  
7 PROPERTIES, PLUS THE LAB RESULTS, IF THEY CONFIRM THAT IT  
8 IS MONOKOTE-3 AND THERE IS ASBESTOS, WHAT ARE YOU  
9 UTILIZING THAT FOR? IS THAT FOR THE ISSUE OF HIS OPINION  
10 THAT THERE IS HAZARD?

11                  MR. BOUCHER: THAT THERE IS CONTAMINATION, CORRECT.

12                  THE COURT: SO HIS OPINION THEN, HIS OPINION THAT  
13 THERE IS HAZARD WOULD HAVE TO BE IN THE FORM OF SOMEWHAT  
14 OF A HYPOTHETICAL QUESTION. HE'D HAVE TO ASSUME CERTAIN  
15 THINGS, HIS OBSERVATIONS, HIS PAST EXPERIENCE. WOULD HE  
16 HAVE TO ASSUME THE TRUTH OF THE LAB RESULTS?

17                  MR. BOUCHER: HE'D HAVE TO RENDER HIS OPINION BASED  
18 IN PART UPON THE LABORATORY RESULTS WHICH HE'S --

19                  THE COURT: ALL RIGHT. SO WHAT DO YOU PROVIDE ME  
20 IN YOUR POINTS AND AUTHORITIES THAT TELLS ME THAT THE LAB  
21 RESULTS COME IN FOR THE TRUTH OF THE MATTER?

22                  MR. BOUCHER: THOSE ARE TWO DIFFERENT THINGS, YOUR  
23 HONOR.

24                   UNDER THE EVIDENCE CODE, I BELIEVE IT IS  
25 SECTION 801, MR. HATFIELD CAN TESTIFY THAT HE TOOK SOME  
26 DUST SAMPLES. HE SENT THEM OFF FOR LABORATORY ANALYSIS;  
27 THAT THE LABORATORY ACTUALLY DID THE FIBER COUNTING. AND  
28 HE HAS REVIEWED THOSE RESULTS AND, BASED UPON THOSE

1 RESULTS, IT IS HIS OPINION, AS WELL AS HIS BACKGROUND AND  
2 EXPERIENCE, IT IS HIS OPINION THAT THERE IS CONTAMINATION  
3 IN THE BUILDING.

4 HE CAN GO THAT FAR UNDER THE EVIDENCE CODE  
5 REGARDLESS OF WHETHER RESULTS COME IN FOR THE THE TRUTH  
6 OF THE MATTER ASSERTED. AND THE EVIDENCE CODE SAYS  
7 CLEARLY THAT AN EXPERT CAN RELY UPON SUCH RESULTS,  
8 WHETHER OR NOT THEY ARE THEMSELVES ADMISSIBLE.

9 AND WE'VE CITED A COUPLE OF CASES, ONE OF  
10 WHICH WE BELIEVE IS DIRECTLY ON POINT. AND THAT IS THE  
11 WILLIAMS VS. VOLKSWAGEN CASE, WHERE THE COURT FOUND THAT  
12 AN EXPERT WHO, RIGHT BEFORE TRIAL AND AFTER HIS  
13 DEPOSITION WAS TAKEN, IN FACT HAD A LABORATORY PERFORM A  
14 STRESS TEST ON A PART OF THE VOLKSWAGEN, AND THEN  
15 RENDERED HIS OPINION BASED UPON THE LABORATORY ANALYSIS  
16 AND CHEMICAL ANALYSIS FROM THAT STRESS TEST. THE COURT  
17 ALLOWED NOT ONLY HIS OPINIONS BASED UPON THOSE TESTS, BUT  
18 ALLOWED THE TEST RESULTS THEMSELVES IN.

19 THE CASE CITED BY THE DEFENDANTS, WHICH IS  
20 CONTINENTAL AIRLINES, IS DISTINGUISHABLE. BUT FROM THE  
21 STANDPOINT OF THE VERY FIRST ISSUE, AND THAT IS THAT MR.  
22 HATFIELD CAN TESTIFY THAT HE HAS REVIEWED THE RESULTS OF  
23 THE TESTS AND BASES HIS OPINIONS IN PART UPON THOSE TEST  
24 RESULTS, IN CONTINENTAL AIRLINES THE COURT SPECIFICALLY  
25 SAID THAT AN EXPERT, EVEN THOUGH TWO OTHER INDIVIDUALS  
26 PERFORMED THE ACTUAL ANALYSIS, MAY RELY UPON THOSE  
27 FIGURES SUBMITTED TO HIM IN FORMING HIS EXPERT OPINIONS  
28 AND TO TESTIFY THAT HE RELIED UPON THEM.

1 NOW, THE IN THE CONTINENTAL CASE --

2 THE COURT: WELL, IN WILLIAMS VS. VOLKSWAGEN THERE

3 WAS A STRESS TEST ON A PORTION OF THE VEHICLE?

4 MR. BOUCHER: THAT'S CORRECT.

5 THE COURT: WAS THAT LATER ADMITTED INDEPENDENTLY

6 THROUGH THE PERSON WHO PERFORMED THE STRESS TEST --

7 MR. BOUCHER: NO.

8 THE COURT: -- IN THE CASE?

9 MR. BOUCHER: NO. THEY WERE PERMITTED THROUGH THE

10 EXPERT WHO HAD THE STRESS TEST PERFORMED.

11 NOW, THE COURT --

12 THE COURT: WELL, I MEAN LOOKING AT 801, YOU HAVE

13 JUST IN PLAIN LANGUAGE OF THE SECTION, YOU HAVE CERTAINLY

14 AN ARGUMENT THAT SAYS IT MAY BE PERCEIVED BY OR BE

15 PERSONALLY KNOWN TO THE WITNESS OR MADE KNOWN TO HIM AT

16 OR BEFORE THE HEARING, WHETHER OR NOT ADMISSIBLE. IT IS

17 OF A TYPE THAT REASONABLY MAY BE RELIED UPON BY AN

18 EXPERT.

19 SO CERTAINLY ON ITS FACE IF HE'S AN EXPERT

20 IN THIS AREA OF CONTAMINATION, THEN HE COULD REASONABLY

21 RELY ON LAB RESULTS FROM A REPUTABLE LAB AS FAR AS HE WAS

22 CONCERNED, EVEN IF THE LAB RESULTS DON'T COME IN, I MEAN

23 JUST LOOKING AT THE FACE OF THE STATUTE.

24 MR. BIDERMAN: YOUR HONOR, THE STATUTE HAS BEEN

25 INTERPRETED AND I REFER THE COURT TO -- IT IS ACTUALLY

26 THE POCKET PART OF THE JEFFERSON BENCHBOOK AND THE CASES

27 THAT WE'VE CITED. THE CONTINENTAL CASE IS ONLY ONE.

28 THERE IS MOSESIAN, M-O-S-E-S-I-A-N, VS. PENWALT AND

1 COLEMAN, AND AGAIN IT IS 384 OF THE -- DISCUSSED AT PAGE  
2 384 OF THE POCKET PART, I BELIEVE, OF THE JEFFERSON  
3 BENCHBOOK, SECTION 29.4.

4 JEFFERSON STATES THAT WHILE AN EXPERT CAN  
5 RELY ON OTHER THINGS, AN EXPERT CANNOT SET FORTH THE  
6 OPINIONS OF ANOTHER EXPERT IN PROVIDING HIS TESTIMONY  
7 BECAUSE THERE IS THE RISK, OF COURSE, THAT THOSE  
8 OPINIONS, WHICH ARE NEVER ADMITTED INTO EVIDENCE, WILL BE  
9 DEEMED BY A JURY TO BE OFFERED FOR THEIR ACTUAL TRUTH,  
10 WHEN THEY CAN'T BE ADMITTED FOR THE TRUTH UNLESS THERE IS  
11 SOME INDEPENDENT BASIS FOR THEIR ADMISSION.

12 I'M SPECIFICALLY READING FROM JEFFERSON ON  
13 DIRECT EXAMINATION: AN EXPERT MAY NOT SET FORTH THE  
14 OPINIONS OF OTHER EXPERTS TO BOLSTER THE WITNESS'S  
15 OPINION, SINCE OTHER OPINIONS ARE BEING OFFERED FOR THE  
16 TRUTH AND CONSTITUTE INADMISSIBLE HEARSAY. AND THAT IS  
17 PRECISELY WHAT PLAINTIFFS WOULD HAVE MR. HATFIELD DO IN  
18 THIS CASE.

19 ALL MR. HATFIELD HAS DONE IS DO THE  
20 VACUUMING. AND THEN IF PLAINTIFFS THEN ARE PERMITTED TO  
21 ACTUALLY HOLD UP THIS CHART AND RECITE THE VARIOUS COUNTS  
22 AND ANALYSES THAT WERE PREPARED BY MR. MILLETTE, ANOTHER  
23 EXPERT WHO IS NOT AVAILABLE, THAT IS ESSENTIALLY THE  
24 INTRODUCTION OF INADMISSIBLE HEARSAY THROUGH MR.  
25 HATFIELD.

26 THAT IS PRECISELY WHAT JEFFERSON SAID IS  
27 NOT PERMITTED IN CIRCUMSTANCES SUCH AS THIS, PARTICULARLY  
28 WHETHER THERE WILL NEVER BE A BASIS FOR BRINGING IN THE

1 UNDERLYING CASES. AGAIN I REFER THE COURT TO THE  
2 JEFFERSON BENCHBOOK. IT REALLY DISCUSSES THAT QUITE  
3 THOROUGHLY AND QUITE EMPHATICALLY, THAT ONE EXPERT CANNOT  
4 TESTIFY IN DETAIL ABOUT ANOTHER EXPERT'S OPINIONS. WE  
5 CITED TO THE COURT ALSO THE GRIMSHAW CASE FOR THAT  
6 PROPOSITION.

7 SO, ONE, YOUR HONOR WE DISAGREE WITH THE  
8 PLAINTIFF'S CONTENTION THAT MR. HATFIELD CAN RELY UPON  
9 INADMISSIBLE HEARSAY OF DR. MILLETTE IN GIVING HIS  
10 OPINIONS, BECAUSE THAT IS, AS THE COURT STATED ON FRIDAY,  
11 ESSENTIALLY A ONE TO ONE RELATIONSHIP. ALL MR. HATFIELD  
12 HAS DONE IS DO THE VACUUMING. HE WOULD THEN TESTIFY  
13 ABOUT CONTAMINATION BASED NOT UPON HIS VACUUMING, BUT  
14 BASED UPON AN ANALYSIS DONE BY ANOTHER EXPERT.

15 SO AGAIN, ONE, WE DON'T THINK THERE SHOULD  
16 BE ANY RELIANCE ON THESE INADMISSIBLE OPINIONS OF DR.  
17 MILLETTE. NUMBER TWO, YOUR HONOR, THAT THE OPINIONS  
18 THEMSELVES DO NOT COME INTO EVIDENCE IF RELIED UPON.  
19 EVEN THE CASE THAT PLAINTIFFS CITE, THE WILLIAMS CASE,  
20 DOES NOT HOLD THAT SIMPLY BECAUSE AN EXPERT RELIES ON  
21 SOMETHING, IT THEN COMES IN FOR AFFIRMATIVE EVIDENCE.

22 AND I ALSO NOTE, YOUR HONOR, THAT IN THE  
23 WILLIAMS CASE IT WAS A METALLURGICAL EXPERT WHO RELIED  
24 UPON A STRESS TEST. THIS METALLURGICAL EXPERT HAD DONE  
25 HIS OWN ANALYSIS OF THE PART, AND THAT STRESS TEST WAS  
26 DEEMED TO BE A NON-CONTROVERSIAL COMPUTATION, WHICH IS  
27 EXACTLY THE OPPOSITE OF WHAT WAS DONE HERE BY DR.  
28 MILLETTE, WHICH AS THE COURT KNOWS FROM THE

1 CROSS-EXAMINATION OF DR. LONGO, IT IS EXTREMELY  
2 CONTROVERSIAL, THE ENTIRE DUST SAMPLING PROTOCOL.

3 THE FACT THAT IT HAS NOT BEEN APPROVED BY  
4 EITHER THE E.P.A. OR ANY STANDARDIZED TESTING  
5 ORGANIZATION, PRECISELY WHAT GOES INTO DOING THE DUST  
6 SAMPLING, WHETHER THERE IS HYDROCHLORIC ACID ADDED TO THE  
7 LIQUID THAT IS APPLIED TO THE DUST, WHETHER THERE IS ANY  
8 SEDIMENT OBSERVED IN THE TEST TUBE, THE INTENSITY OF THE  
9 SONICATION, HOW THE ALIQUOT SAMPLE IS TAKEN OUT, ALL OF  
10 THAT IS NOT DESCRIBED IN THE DOCUMENT THAT PLAINTIFFS  
11 ATTEMPT TO RELY UPON.

12 AND WE HAVE NO OPPORTUNITY TO CROSS EXAMINE  
13 THE WITNESS ABOUT THAT, AND IT IS A FUNDAMENTAL PART OF  
14 THE ANALYSIS. IT IS NOT A NONCONTROVERSIAL COMPUTATION,  
15 SUCH AS THE CASE IN THE WILLIAMS COURT.

16 THE COURT: DO THE PLAINTIFFS INTEND TO SEEK THE  
17 LAB RESULTS INDEPENDENTLY OF MR. HATFIELD IN THIS CASE?

18 MR. BOUCHER: NO, YOUR HONOR, ALTHOUGH WE DO HAVE  
19 THE CUSTODIAN OF RECORDS FROM THE LABORATORY HERE TO LAY  
20 A FOUNDATION, IF NECESSARY. BUT NO, DR. LONGO TESTIFIED  
21 ABOUT SONICATION. MR. HATFIELD IN HIS DEPOSITION WAS  
22 EXTENSIVELY EXAMINED ABOUT THE VERY ISSUES THAT MR.  
23 BIDERMAN JUST RAISED WITH THE COURT.

24 THE COURT: WHAT WOULD THE CUSTODIAN OF RECORDS BE  
25 ABLE TO TELL FROM THE DOCUMENT? WOULD YOU BE ABLE TO  
26 TELL WHAT METHOD WAS UTILIZED TO ANALYZE?

27 MR. BOUCHER: YES. THE CUSTODIAN OF RECORDS FROM  
28 THE LABORATORY ACTUALLY PERFORMED QUALITY CONTROL ON THE

1 SAMPLES AS WELL FROM THE LABORATORY, AND HE WILL BE ABLE  
2 TO TESTIFY ABOUT THE METHOD THAT WAS USED AND WHAT THE  
3 RESULTS, JUST SIMPLY HOW THE RESULTS WERE OBTAINED.

4 BUT AGAIN, WE DON'T THINK IT NEEDS TO GO  
5 THAT FAR. MR. HATFIELD, AS IN WILLIAMS, CAN TESTIFY  
6 ABOUT THESE -- THEIR OBJECTIVE FACTS. ALL A MICROSCOPIST  
7 DOES IS LOOK UNDER A MICROSCOPE AND COUNT. THAT'S ALL  
8 MILLETTE DOES. THEY LOOK UNDER A MICROSCOPE AND THEY  
9 COUNT STRUCTURES. IN FACT, MR. HATFIELD HAS VERIFIED.  
10 WE HAD HIM THIS WEEKEND ACTUALLY GO TO THE MILLETTE LAB  
11 AND LOOK AT THE ASBESTOS FIBERS AND COUNT FOR HIMSELF AND  
12 LOOK AT THE VERMICULITE HIMSELF, WHICH HE'S QUALIFIED TO  
13 DO AND IN FACT DID.

14 ALL THE MICROSCOPIST DOES IS THE SAME THING  
15 THAT WAS PERFORMED IN WILLIAMS, AND THAT IS CALCULATIONS.  
16 THEY ARE OBJECTIVE FACTS. THEY ARE NOT OPINIONS. AND  
17 THE CASES THAT HAVE HELD OPINIONS CAN'T COME IN GO  
18 SOMETHING LIKE THIS, YOUR HONOR. YOU HAVE A DOCTOR ON  
19 THE STAND WHO HAS X-RAYS ANALYZED. AND HE TESTIFIES  
20 ABOUT HIS OPINIONS ABOUT THE X-RAYS, HE THEN HAS THE  
21 ENTIRE STAFF AT STANFORD LOOK AT THE X-RAYS.

22 AND HE TELLS THE JURY: I HAD THE ENTIRE  
23 STAFF AT STANFORD LOOK AT THE X-RAYS AND THEY SAID THEY  
24 COULD NOT FIND ANYTHING IN THESE X-RAYS EITHER. WELL,  
25 THERE YOU'RE GETTING IN THE OPINIONS OF OTHER EXPERTS  
ABOUT HOW THEY INTERPRETED THE X-RAYS THEMSELVES, AS  
27 OPPOSED TO SIMPLE LABORATORY SCIENTIFIC ANALYSIS. DR.  
28 MILLETTE DOES NOT IN HIS REPORT GIVE AN OPINION ABOUT

1 CONTAMINATION. HE DOES NOT RENDER AN OPINION ABOUT THE  
2 SIGNIFICANCE OF THE THE RESULTS.

3 ALL HE DOES IS COUNT THE STRUCTURES AND  
4 PROVIDE THE LABORATORY STRUCTURE COUNTS. IT IS THEN MR.  
5 HATFIELD WHO CAN REVIEW THE STRUCTURE COUNTS AND RENDER  
6 OPINIONS ABOUT CONTAMINATION AND RENDER OPINIONS ABOUT  
7 THE SIGNIFICANCE OF CONTAMINATION BASED ON WHAT HE SAW  
8 AND BASED UPON THAT ANALYSIS, AND IT IS JUST A SCIENTIFIC  
9 CALCULATION.

10 AND UNDER SECTION 801, WHETHER OR NOT THE  
11 COURT FINDS THAT THE ACTUAL COUNTS THEMSELVES ARE  
12 ADMISSIBLE, CERTAINLY HIS RELIANCE UPON THE FACT THAT HE  
13 HAD THEM ANALYZED IS ADMISSIBLE. MOREOVER, IT IS  
14 PERMISSIBLE TO SHOW THE COUNTS TO THE JURY. AND IF THE  
15 COURT FINDS THAT THERE IS NOT A SUFFICIENT BASIS FOR THE  
16 COUNTS THEMSELVES TO COME IN AS SCIENTIFIC EVIDENCE, THEN  
17 A LIMITING INSTRUCTION IS APPROPRIATE. AND THE APPELLATE  
18 COURTS HAVE CLEARLY GONE THAT SUCH IS AN APPROPRIATE  
19 VEHICLE FOR DEALING WITH THAT PROBLEM.

20 SO THE BOTTOM LINE IS, YOUR HONOR, THAT  
21 ONE, WE BELIEVE THAT AS A MICROSCOPIST SIMPLY COUNTING  
22 THE STRUCTURES THEMSELVES AND LISTING THE AMOUNT OF  
23 STRUCTURES SEEN UNDER THE MICROSCOPE, IT IS NO DIFFERENT  
24 THAN WILLIAMS, AND THOSE RESULTS CAN ACTUALLY COME IN.

25 IF THE COURT FINDS THAT THE RESULTS  
26 THEMSELVES DON'T COME IN BASED UPON THAT, THEN CERTAINLY  
27 UNDER SECTION 801 OF THE EVIDENCE CODE MR. HATFIELD CAN  
28 RENDER HIS OPINIONS ABOUT WHAT HE REVIEWED AND THE FACT

1 THAT THEY ARE BASED UPON THIS ANALYSIS THAT HE HAS  
2 PERFORMED.

3 FINALLY, IF NECESSARY WE CAN LAY THE  
4 FOUNDATION THROUGH MR. HATFIELD, BASED ON THE FACT THAT  
5 WE HAD HIM THIS WEEKEND GO BACK TO THE LABORATORY ITSELF  
6 AND ACTUALLY LOOK AT THE RESULTS HIMSELF TO MAKE THE  
7 COUNTS AND TO VERIFY THE COUNTS; AND THAT FINALLY, WE  
8 HAVE THE CUSTODIAN OF RECORDS HERE IF THAT IS NECESSARY.

9 THE COURT: SO HE'S CAPABLE OF GIVING TESTIMONY AS  
10 TO COUNTS HIMSELF?

11 MR. BOUCHER: THAT'S CORRECT. WHAT HAPPENS, YOUR  
12 HONOR, IS UNDER THE T.E.M. ANALYSIS THE MICROSCOPIST  
13 LOOKS UNDER THE MICROSCOPE AND IDENTIFIES THE STRUCTURES.  
14 AND THEN AS THE COURT HEARD FROM PREVIOUS EXPERTS, THAT  
15 IS, A DEFRACTION EX-RAY DISPERSION ANALYSIS IS PERFORMED  
16 WHICH SHOWS THAT THERE IS AN ASBESTOS FIBER, THE TYPE OF  
17 FIBER, AND THAT IT IS VERMICULITE; AND THAT MR. HATFIELD,  
18 SPECIFICALLY TO DEAL WITH THIS, WENT TO THE LABS, SAW THE  
19 ASBESTOS STRUCTURES THEMSELVES.

20 MR. BIDERMAN: A NUMBER OF POINTS HAVE BEEN RAISED,  
21 YOUR HONOR. I'M JUST GOING TO TRY TO ADDRESS THEM IN  
22 SERIES.

23 THE FIRST IS -- AND THE CASES ARE SO  
24 UNEQUIVOCAL ON THIS, YOUR HONOR, THAT I AGAIN REQUEST  
25 THAT THE COURT LOOK AT THEM, THE EVIDENCE BENCHBOOK AND  
26 CASES WE'VE CITED. GRIMSHAW, ONE CANNOT USE AN EXPERT AS  
27 A VEHICLE FOR BRINGING IN ANOTHER EXPERT'S OPINION, WHICH  
28 IS EXACTLY WHAT IS DONE HERE.

1 MR. MILLETTE REACHED AN OPINION THAT THERE  
2 WERE X NUMBER OF FIBERS IN THESE VARIOUS SAMPLES THAT  
3 WERE TAKEN. YOU CANNOT USE THAT INADMISSIBLE HEARSAY,  
4 PRESENT THAT TO THE JURY IN ANY DETAIL WHEN THERE IS NO  
5 FOUNDATIONAL BASIS FOR HAVING THAT EVIDENCE ADMITTED IN  
6 AND OF ITSELF. AGAIN, THE GRIMSHAW VS. FORD MOTOR  
7 COMPANY, AN EXPERT MAY NOT TESTIFY AS TO THE DETAILS OF  
8 MATTERS WHICH ARE OTHERWISE INADMISSIBLE.

9 HE MAY NOT UNDER THE GUISE OF REASONS BRING  
10 BEFORE THE JURY INCOMPETENT HEARSAY EVIDENCE. THAT IS  
11 SPECIFICALLY PRECLUDED, PEOPLE VS. YOUNG. THE RULE WHICH  
12 ALLOWS THE EXPERT TO STATE THE REASONS UPON WHICH OPINION  
13 IS BASED MAY NOT BE USED AS A VEHICLE TO BRING BEFORE THE  
14 JURY INCOMPETENT EVIDENCE.

15 EXPERTS MAY NOT RELATE AN OUT OF COURT  
16 OPINION BY ANOTHER EXPERT AS INDEPENDENT PROOF. THEY  
17 CANNOT REVEAL THE CONTENTS OF THAT OTHER OPINION.

18 THAT IS CLEARLY WHAT MR. HATFIELD WOULD BE  
19 DOING IF HE TALKED ABOUT THE COUNTS THAT WERE MADE. HE  
20 WOULD BE PRODUCING AN OPINION DONE BY SOMEBODY ELSE.  
21 INTRODUCING IT BEFORE THE JURY. AND THE STATEMENT THAT  
22 MR. BOUCHER SAYS, WELL, GEE, THAT MAY NEVER COME IN AS  
23 EVIDENCE, THAT IS PRECISELY WHY MR. HATFIELD SHOULD NOT  
24 BE ALLOWED TO USE THAT KIND OF INFORMATION, BECAUSE IT IS  
25 NOT EVIDENCE.

26 IT WILL NEVER BE EVIDENCE. AND FOR HIM TO  
27 SAY THAT HE HAS RELIED UPON THIS AND RECITE THAT  
28 INFORMATION IN DETAIL BEFORE THE JURY CREATES EXACTLY THE

1 CONTRARY CONCLUSION AND CANNOT BE CURED BY A LIMITING  
2 INSTRUCTION, AS THE GRIMSHAW CASE, THE MOSESIAN CASE  
3 CITE, AND AGAIN AS JEFFERSON HIMSELF CITES.

4 SO NUMBER ONE, MR. HATFIELD SHOULD NOT BE  
5 PERMITTED TO RELY UPON THIS HEARSAY EVIDENCE THAT IS NOT  
6 OTHERWISE ADMISSIBLE. NUMBER TWO --

7 THE COURT: WELL, JUST FROM YOUR ARGUMENT YOU HAVE  
8 NOT PRECLUDED A RELIANCE UPON IT. YOU HAVE PRECLUDED THE  
9 RECITATION OF DETAILS BY YOUR OWN ARGUMENT.

10 SO ARE YOU SAYING THAT HATFIELD CAN SAY  
11 THAT HE SENT THE SAMPLES TO A CERTAIN LAB, HE GOT THE  
12 RESULTS, AND WITHOUT PULLING OUT THE CHART, AND  
13 INDICATING EXACTLY WHAT WAS FOUND, IF HE COULD SAY TO HIS  
14 SATISFACTION THAT THERE WAS A SHOWING THAT THERE WAS  
15 ASBESTOS AT A CERTAIN LEVEL AND THAT THERE WAS  
16 MONOKOTE-3, AND HE RELIED ON THAT, THOSE GENERALITIES, IN  
17 COMING TO HIS OPINION, WITHOUT HAVING TO PULL OUT A  
18 CHART AS TO WHAT THINKS, DO YOU THINK HE COULD DO THAT?

19 MR. BIDERMAN: YOUR HONOR, NO, WE DO NOT BELIEVE  
20 SO, IF IT IS NOT OTHERWISE GOING TO BE ADMISSIBLE, IF THE  
21 INFORMATION WILL NOT OTHERWISE BE ADMISSIBLE. IT IS  
22 DETAILED HEARSAY EVIDENCE.

23 THE COURT: IT'S NOT COMING OUT AS DETAILED  
24 HEARSAY. IT IS COMING OUT IN CONCLUSIONARY FASHION.

25 MR. BIDERMAN: THAT THERE WERE JUST SOME COUNTS  
26 MADE?

27 THE COURT: THERE WERE COUNTS MADE. HE MIGHT SAY  
28 TO A GENERALITY OF AT LEAST THIS AMOUNT AND THAT WAS GOOD

1 ENOUGH FOR ME TO RELY UPON. I MEAN AS AN EXPERT, HE HAS  
2 TO KNOW, HE HAS TO RELY ON A CERTAIN AMOUNT OF ASBESTOS,  
3 I SUPPOSE, TO COME TO AN OPINION THAT THERE IS  
4 CONTAMINATION.

5 MR. BIDERMAN: YOUR HONOR, THE PROBLEM IN THIS CASE  
6 IS EXACTLY WHAT THE COURT POINTED OUT ON FRIDAY.  
7 ESSENTIALLY, IT IS A ONE TO ONE ANALYSIS.

8 HE DOES NOT BRING ANYTHING TO BEAR OTHER  
9 THAN THE FACT THAT HE'S DONE THESE DUST SAMPLES, SENDS  
10 THEM BACK, AND THEN GETS THE RESULT. ESSENTIALLY HE'S  
11 BEING USED AS A SUBSTITUTE FOR MR. MILLETTE, BECAUSE HIS  
12 OPINION ON CONTAMINATION IS BASED ENTIRELY ON THESE  
13 RESULTS. SO THERE IS A ONE TO ONE CORRESPONDENCE  
14 BETWEEN --

15 THE COURT: LET ME ASK YOU, WHAT IS YOUR OBJECTION  
16 TO THE BUSINESS RECORDS EXCEPTION?

17 MR. BIDERMAN: THE OBJECTION TO THE BUSINESS  
18 RECORDS EXCEPTION IS, YOUR HONOR, THAT IT IS NOT A  
19 BUSINESS RECORD. THE CASES HAVE HELD, WE HAVE CITED TWO  
20 FEDERAL CASES FOR THE COURT --

21 THE COURT: IN YOUR PAPERS.

22 MR. DEFENSE: YES.

23 MR. BIDERMAN: THEY ARE, YOUR HONOR, THAT, AND  
24 UNDER THE CALIFORNIA LAW THERE HAS TO BE AN INDEPENDENT  
25 BASIS FOR THE TRUSTWORTHINESS OF THE COUNTS. IT IS  
26 PREPARED IN CONNECTION WITH LITIGATION, FOR USE IN  
27 LITIGATION. IT DOES NOT CONSTITUTE A BUSINESS RECORD.  
28 IT IS AN INVOICE, A BILL OF LADING, THAT TYPE OF BUSINESS

1 RECORD DOCUMENT.

2 THE CUSTODIAN, YOUR HONOR, WAS NOT  
3 DESIGNATED ON THEIR WITNESS LIST. IT WAS NOT DESIGNATED  
4 AS AN EXPERT. AND ESSENTIALLY BY PERMITTING THE RESULTS  
5 TO COME IN AS A BUSINESS RECORD WOULD BE TO CIRCUMVENT  
6 ALL THE RULES GOVERNING THE DISCOVERY OF EXPERT  
7 WITNESSES. WE THEN HAVE NO OPPORTUNITY TO HAVE ANY  
8 CROSS-EXAMINATION ABOUT HOW THE COUNTS WERE PREPARED, HOW  
9 THE SAMPLES WERE PREPARED, HOW THE SONICATION WAS DONE.

10 THERE IS NO OPPORTUNITY WHATSOEVER BECAUSE  
11 THE RECORD COMES IN WITHOUT ANY INDEPENDENT ANALYSIS OR  
12 REVIEW. THE PURPOSE FOR HAVING AN EXPERT DESIGNATION,  
13 FOR HAVING EXPERT DEPOSITIONS IS SO THAT ONE CAN TEST THE  
14 EXPERT'S OPINIONS. TO PERMIT THOSE IN AS A BUSINESS  
15 RECORD WOULD ENTIRELY CIRCUMVENT THAT RULE.

16 YOUR HONOR, THE ANALYST IS NOT HERE. THE  
17 PERSON WHO HAS ACTUALLY DONE THE ANALYSIS IS STILL NOT  
18 HERE. IT IS SIMPLY SOMEBODY WHO WILL TALK ABOUT WHAT THE  
19 RECORDS SAY. WE STILL HAVE NO OPPORTUNITY TO FIND OUT  
20 HOW THOSE SAMPLES WERE PREPARED, HOW THE COUNTS WERE  
21 MADE.

22 THE COURT: WELL, IT DOES NOT SOUND LIKE THAT IS  
23 WHAT THEY HAVE.

24 DO YOU HAVE A CUSTODIAN OF THE RECORDS WHO  
25 CAN TESTIFY AS TO THE METHOD BY WHICH THE ANALYSIS WAS  
26 DONE IN GENERAL TERMS?

27 MR. BOUCHER: THAT'S CORRECT, AS WELL AS --

28 THE COURT: IN OTHER WORDS, IF THEIR LAB SAYS IT

1 WAS DONE UNDER X METHOD, THEN THIS PERSON IS FAMILIAR  
2 WITH WHAT THAT METHOD IS AS FAR AS PROCEDURAL --

3 MR. BOUCHER: YES. AS WELL AS THE FACT THAT HE  
4 HIMSELF PERFORMED QUALITY CONTROL ON THESE SAMPLES.

5 MR. BIDERMAN: AGAIN, YOUR HONOR, HE'S NOT ON THE  
6 WITNESS LIST. IT IS -- BECAUSE DR. MILLETTE WAS REQUIRED  
7 TO BE MADE AVAILABLE, A DATE WAS SET FOR HIS DEPOSITION.  
8 HE DID NOT ATTEND HIS DEPOSITION. HE WAS NOT MADE  
9 AVAILABLE ON THAT DATE. ESSENTIALLY, PLAINTIFFS ARE  
10 BRINGING IN ANOTHER EXPERT WHO WAS UNDESIGNATED,  
11 UNDEPOSED, AND IN CONTRAVENTION OF THE RULES THAT JUDGE  
12 COOPerman SET UP FOR PRETRIAL DISCOVERY.

13 THE COURT: WELL, THERE ARE TWO THINGS THAT WE CAN  
14 DO. I'M TRYING TO FIGURE OUT A SCHEDULE AT THIS POINT.  
15 OBVIOUSLY, I WANT TO READ WHAT WE HAVE HERE, AND THAT'S  
16 GOING TO DELAY THINGS. BUT EITHER I COULD READ THE  
17 PORTION ABOUT THE BUSINESS RECORDS AND MAKE A DECISION ON  
18 THAT, AND THAT WITNESS COULD BE TAKEN OUT OF ORDER IF I  
19 DECIDE THAT THAT WAS PERMISSIBLE, OR WE COULD GO TO -- DO  
20 YOU HAVE ANY OTHER DIRECT THAT YOU CAN HANDLE WITHOUT  
21 GETTING INTO ANY PREVIOUS ANALYSIS ON OTHER CASES AS WELL  
22 AS THIS CASE AT THIS POINT WITH MR. HATFIELD?

23 MR. BOUCHER: UMM --

24 THE COURT: HAS HE ESTABLISHED THAT, THE TAKING OF  
25 THE SAMPLES?

26 MR. BOUCHER: NO. THAT'S THE NEXT PART OF THE  
27 SLIDES. AND HE'S BROUGHT A CASSETTE TO SHOW THE JURY AND  
28 DEMONSTRATE WHAT HE DOES.

1 THE COURT: I THINK UP TO TAKING THE SAMPLES, I  
2 THINK WE COULD GO THAT FAR. WHAT WE COULD DO IS, I COULD  
3 ORDER THAT WE BIFURCATE THE TESTIMONY AND ORDER CROSS UP  
4 TO THAT POINT. AND THEN I COULD KEEP READING AND CROSS  
5 COULD BE DONE ANYWAY ON WHAT HAS BEEN DONE SO FAR.

6 MR. MANFREDI: I'M JUST THINKING, AS YOU WERE  
7 SAYING THAT, IT WOULD BE VERY DIFFICULT TO CROSS ON WHAT  
8 HAS BEEN DONE BECAUSE THOSE PHOTOGRAPHS ARE TIED INTO THE  
9 PLACES WHERE HE TOOK THE DUST SAMPLES AND SO FORTH, AND I  
10 DON'T WANT TO BE IN A POSITION OF BEING ACCUSED OF  
11 OPENING THE DOOR OF BY VIRTUE OF WHAT I HAVE ASKED ON  
12 CROSS-EXAMINATION BECAUSE THE THINGS ARE RELATED, AND IT  
13 IS GOING TO BE A DIFFICULT PROBLEM.

14 I WOULD URGE THE COURT TO PERHAPS TAKE THE  
15 TIME TO READ THESE BRIEFS EVEN THOUGH WE HAVE A JURY  
16 WAITING.

17 THE COURT: WELL, WHAT WE COULD DO IS, I'LL LOOK AT  
18 THE COUPLE OF CASES. HOW LONG WOULD IT TAKE TO GO  
19 THROUGH THE SAMPLING IF HE GOES THROUGH HIS TESTIMONY  
20 ABOUT THE SAMPLES?

21 MR. BOUCHER: I THINK THERE IS A HALF HOUR, 45  
22 MINUTES MAYBE OF DIRECT EXAMINATION, BECAUSE I'LL ALSO  
23 ASK HIM ABOUT HIS WORK ON THE A.S.D.M. COMMITTEE, ABOUT  
24 SONICATION AND CERTAIN ISSUES RELATED TO THAT AS IT  
25 RELATES TO HIS TESTIMONY. YOU KNOW, HALF HOUR, 45  
26 MINUTES PROBABLY WITHOUT ANY PROBLEM.

27 MR. MANFREDI: YOUR HONOR, ON THE OTHER HAND, WHAT  
28 IS THE RELEVANCE OF ANY OF THIS IF YOU CONCLUDE THAT

1 THOSE SAMPLES MAY NOT BE USED, CANNOT COME INTO EVIDENCE?  
2 I MEAN WE ARE GETTING FURTHER AND FURTHER DOWN THE ROAD  
3 ON SOMETHING WE BELIEVE, VERY VERY STRONGLY BELIEVE IS  
4 NOT ADMISSIBLE.

5 THE OTHER POINT THAT I WOULD MAKE IS THAT  
6 WITH RESPECT TO THIS 45 MINUTES OR WHATEVER, I CERTAINLY  
7 HOPE THAT THERE IS GOING TO BE NO TESTIMONY ABOUT WHAT  
8 THIS WITNESS DID OVER THE WEEKEND. WE DID TAKE HIS  
9 DEPOSITION, YOUR HONOR, CAREFULLY. HE TESTIFIED AMONG  
10 OTHER THINGS AT THAT DEPOSITION THAT WHILE HE IS A LIGHT  
11 MICROSCOPIST, HE IS NOT A TRANSMISSION ELECTRON  
12 MICROSCOPIST.

13 FOR HIM NOW TO COME IN HERE, AND AFTER  
14 GOING BACK TO CAROLINA THIS WEEKEND, AND CLAIM TO HAVE  
15 LOOKED THROUGH THE MICROSCOPE AND DONE THESE COUNTS  
16 HIMSELF, SOMETHING WHICH HE HAD NOT DONE WHEN WE HAD  
17 DISCOVERY FOR HIM ON THE LAST DAY OF DISCOVERY --

18 THE COURT: DO YOU HAVE TO BE CERTIFIED OR DO YOU  
19 HAVE TO HAVE A CERTAIN BACKGROUND TO DO THAT?

20 MR. BOUCHER: NOT TO DO THE COUNTS ON THE -- YOU  
21 HAVE TO HAVE CERTIFICATION AND EXPERT BACKGROUND IN ORDER  
22 TO OPERATE THE ELECTRON MICROSCOPE. BUT THE ELECTRON  
23 MICROSCOPE ACTUALLY TAKES A PICTURE ON THE X-RAY  
24 DISPERSION THAT SHOWS THE FIBER ITSELF THAT YOU DON'T  
25 HAVE TO HAVE THE T.E.M. BACKGROUND IN ORDER TO ANALYZE  
26 AND UNDERSTAND.

27 THE COURT: SO THERE ARE PHOTOS OF WHAT DR.  
28 MILLETTE WOULD HAVE EVALUATED THAT EXIST?

1 MR. BOUCHER: YES, YOUR HONOR, ESSENTIALLY.

2 MR. MANFREDI: NOT THAT HAVE BEEN PRODUCED TO US.

3 THERE ARE NOT.

4 THERE ARE COUNT SHEETS IN WHICH A  
5 MICROSCOPIST SITS AT THE ELECTRON MICROSCOPE, COUNTS THE  
6 ASBESTOS STRUCTURES, MARKS THEM DOWN, MARKS DOWN THEIR  
7 LENGTH AND THEIR WIDTH, AND THERE IS AN ANALYST THAT DOES  
8 THAT, DID THAT, FAXED IT TO MR. HATFIELD.

9 WE EXAMINED HIM ABOUT IT AT HIS DEPOSITION,  
10 FOUND OUT HE HAD NOT DONE ANY OF THE WORK, HAD NOT BEEN  
11 IN FRONT OF THE MICROSCOPE. IT HAD BEEN FAXED TO HIM,  
12 DONE BY SOMEONE ELSE NOT THERE. NOW HE GOES BACK TO  
13 CAROLINA DURING HIS TRIAL, DURING HIS EXAMINATION, AND  
14 SITS IN FRONT OF THE MICROSCOPE AND DOES THIS WORK.

15 HOW DOES THAT COMPLY WITH THE EXPERT  
16 DISCOVERY RULES? HOW DOES THAT FAIRLY PROTECT OUR RIGHTS  
17 TO CROSS EXAMINE AND TO DO DISCOVERY? YOUR HONOR, THEY  
18 HAVE HAD THE MICROSCOPY AVAILABLE SINCE THIS WORK WAS  
19 DONE. FOR REASONS UNKNOWN TO US, THEY RESIST BRINGING  
20 THE PERSON WHO COULD LAY FOUNDATION FOR THIS WORK. THEY  
21 BRING LONGO OUT HERE. THEY BRING HATFIELD OUT HERE.

22 THE COURT: WELL, I KNOW WHY MR. MILLETTE IS NOT  
23 HERE, BECAUSE THEY DID NOT APPARENTLY PRODUCE HIM IN TIME  
24 AND YOU TACTICALLY DO NOT WANT HIM IN HERE. THAT'S  
25 UNDERSTANDABLE.

26 MR. MANFREDI: THEY HAD TWO MICROSCOPISTS UNTIL THE  
27 DAY OR TWO BEFORE THEIR DEPOSITIONS. THEY SAID WE DO NOT  
28 KNOW WHO TO CALL, MILLETTE OR HOPEN. THE DISCOVERY CUT

1 OFF CAME AND WENT, AND THEY PRODUCED NEITHER OF THEM.  
2 AND NOW WE DON'T HAVE THE PERSON WHO DID THE WORK, AND  
3 THIS IS COMING IN THE BACK DOOR.

4 BUT IT ADDS INSULT TO INJURY TO ALLOW THIS  
5 MAN, WHO TESTIFIED HIMSELF AT HIS DEPOSITION THAT HE IS  
6 NOT A ELECTRON MICROSCOPIST, TO GO BACK THERE IN THE  
7 MIDDLE OF HIS TESTIMONY, DO ADDITIONAL WORK AND COME BACK  
8 HERE AND TESTIFY.

9 THE COURT: WELL, I WOULD SAY ON ITS FACE IT LOOKS  
10 LIKE MR. HATFIELD COULD NOT TESTIFY TO GOING BACK THERE  
11 DURING THE TRIAL AND MAKING COUNTS, BECAUSE THAT WAS  
12 TOTALLY UNANTICIPATED. I THINK IT WAS A WHOLE DIFFERENT  
13 AREA OF EXPERTISE THAT HE WOULD SEEM TO BE INVOLVED IN.  
14 SO ON ITS FACE I WOULD SAY HE'S NOT GOING TO TESTIFY, I  
15 WOULD PRECLUDE IT AT THIS POINT, ANY TESTIMONY OF ACTUAL  
16 COUNTS BY HIMSELF OF ANY OF THE EVIDENCE IN THIS CASE.

17 MR. BOUCHER: BASED ON WHAT GROUNDS, YOUR HONOR?  
18 BECAUSE THE ONLY THING HE DID IS HE WENT BACK, AND JUST  
19 FOR THE PURPOSES OF LAYING THE FOUNDATION FOR THE ACTUAL  
20 TEST TO COME IN, WHICH IS BEYOND WHAT WE FEEL IS  
21 NECESSARY AND BEYOND WHAT IS PERMITTED UNDER SECTION 801.

22 I MEAN THERE ARE TWO VERY SEPARATE ISSUES  
23 AND, AS THE DEFENDANTS AMPLY LAY OUT IN THEIR BRIEF, AND  
24 AS THEIR CASES INCLUDING GRIMSHAW AND SO FORTH INDICATE,  
25 AN EXPERT CAN RELY UPON INADMISSIBLE HEARSAY AND INDICATE  
26 TO THE JURY THAT HE'S RELYING UPON INADMISSIBLE HEARSAY  
27 AND RELATE IN GENERAL TERMS WHAT THAT IS.

28 BUT TO LAY THE FOUNDATION, MR. HATFIELD

1 WENT OUT AND LOOKED AT THE ACTUAL ANALYSIS ITSELF, WHICH  
2 IS WHAT I'M SHOWING THE COURT. IT'S AN EXAMPLE OF  
3 SOMETHING THAT IS ALREADY IN EVIDENCE THROUGH DR. COHEN,  
4 BUT THAT IS AN X-RAY DISPERSION OF WHAT HAPPENS WHEN THE  
5 MICROSCOPE FOCUSES ON IT. IT COMES UP ON AN X-RAY  
6 SCREEN, AND THIS TYPE OF PATTERN COMES UP.

7 AND MR. HATFIELD IS IN FACT QUALIFIED TO  
8 TESTIFY ABOUT IT. AND WHAT IT SHOWS -- AND IN FACT, MR.  
9 MILLETTE WORKED UNDER THE DIRECTION OF MR. HATFIELD AT MC  
10 CRONE LABORATORIES PRIOR TO MR. HATFIELD THEN MOVING ON  
11 TO LAW ENGINEERING OR LAW ASSOCIATES. SO THE ONLY THING  
12 HE DID THIS WEEKEND WAS SATISFY HIMSELF FROM THE  
13 FOUNDATIONAL POINT OF VIEW OF THE ACTUAL COUNTS. BUT  
14 THAT GOES ON --

15 THE COURT: YOU'RE SAYING THAT HE CAN TESTIFY TO  
16 THAT IN FRONT OF THE JURY?

17 MR. BOUCHER: HE'S QUALIFIED TO NOW.

18 THE COURT: WHAT IS HIS CERTIFICATION AGAIN? WHAT  
19 IS HIS PROFESSIONAL TITLE?

20 MR. BOUCHER: MR. HATFIELD IS VICE PRESIDENT-  
21 CONSULTANT AT LAW ASSOCIATES. AND HE'S GOT A BACKGROUND  
22 IN POLARIZED LIGHT MICROSCOPY, BUT ADDITIONALLY HE, AS I  
23 THINK THERE HAS ALREADY BEEN TESTIMONY ABOUT, HE IS ON  
24 THE A.S.D.M. COMMITTEE AND THE E.P.A. COMMITTEE BY  
25 APPOINTMENT DECIDING THIS EXACT PROTOCOL, AND IS MAKING A  
26 DETERMINATION OF EXACTLY HOW THIS PROCESS IS UTILIZED AND  
27 SO FORTH. AND HE'S TAUGHT THIS AT UNIVERSITIES AROUND  
28 THE COUNTRY.

1 THE COURT: NO, BUT THE POINT IS IN DISCOVERY IF  
2 YOU DID NOT DESIGNATE HIM AS A PERSON WHO IS GOING TO  
3 TESTIFY TO THE ACTUAL COUNTS AND TO THE MISCROSCOPY WORK,  
4 THEN THERE WOULD HAVE BEEN NO DISCOVERY ABOUT THAT AND  
5 THERE WOULD BE NO PRIOR ABILITY TO CROSS EXAMINE IN THAT  
6 AREA.

7 MR. BOUCHER: YOUR HONOR, AT THE DEPOSITION THEY  
8 DID EXACTLY QUESTION HIM ABOUT SONICATION. THEY  
9 QUESTIONED HIM ABOUT THESE COUNTS. THEY TOOK HIM THROUGH  
10 THE COUNT SHEETS AND HAD HIM DISCUSS AND ANALYZE THE  
11 COUNTS SHEETS. THEY ASKED HIM HIS OPINIONS ABOUT THE  
12 NUMBER OF ASBESTOS FIBERS. THEY WENT IN DEPTH WITH HIM  
13 ON HIS DEPOSITION ABOUT THESE EXACT POINTS.

14 THE COURT: NOT ABOUT VIEWING IT, HIM PERSONALLY  
15 PHYSICALLY VIEWING IT UNDER A MICROSCOPE AND VERIFYING  
16 THE COUNTS.

17 I CAN UNDERSTAND THEM GOING THROUGH ANY  
18 COUNTS THAT WERE THE BASIS OF HIS OPINION. THAT WOULD BE  
19 NORMAL. BUT IT'S RATHER A SURPRISE FOR THEM TO COME HERE  
20 AND FIND OUT THAT OVER THE WEEKEND THEY HAVE ANOTHER AREA  
21 TO CROSS EXAMINE HIM ABOUT THAT THEY WERE NOT AWARE TO BE  
22 PREPARED ON AND HE OBVIOUSLY WAS NOT PREPARED UNTIL THIS  
23 WEEKEND.

24 MR. BOUCHER: AGAIN, YOUR HONOR, THE ONLY THING HE  
25 DID WAS GO THROUGH, VIEW THE COUNTS FOR FOUNDATIONAL  
26 PURPOSES. AND WE AGAIN BELIEVE THAT IS BEYOND WHAT IS  
27 NECESSARY, BUT WE JUST DID IT OUT OF AN ABUNDANCE OF  
28 CAUTION. HE WAS DESIGNATED AS A PERSON WHO WOULD TESTIFY

1 ABOUT SAMPLE ANALYSIS AND ANALYTICAL PROCEDURES.

2 THE COURT: I WOULD THINK HE'D HAVE TO KNOW  
3 SOMETHING ABOUT THE ANALYTICAL PROCEDURES TO RELY UPON  
4 THE RESULTS AS AN EXPERT ON THE ISSUE OF CONTAMINATION.  
5 HE'D HAVE TO UNDERSTAND THE RESULTS.

6 IN OTHER WORDS, IF HE GETS IT FROM THE LAB,  
7 HE'D HAVE TO KNOW WHAT TECHNIQUE THEY USED. IS IT A  
8 REPUTABLE TECHNIQUE? IS IT SOMETHING HE SHOULD RELY ON  
9 AS AN EXPERT? THAT'S ALL WELL AND GOOD. BUT I'M WILLING  
10 TO GO WITH THE SAMPLING PORTION OF THE TESTIMONY.

11 I'LL HEAR FROM MR. MANFREDI.

12 MR. MANFREDI: YES. MR. BOUCHER HELD UP SOME  
13 THINGS, OF COURSE, THAT WE'RE NOT PRIVY TO SINCE THEY  
14 WERE NEVER PRODUCED TO US, ALLEGEDLY WORK THAT THE  
15 WITNESS DID OVER THE WEEKEND.

16 THESE ARE WHAT THEY CALL COUNT SHEETS.

17 THESE WERE PRODUCED AT THE WITNESS'S DEPOSITION. AS YOU  
18 WILL SEE, THE ANALYST IS A.T.C. OR R.K.W. WHO WAS LOOKING  
19 THROUGH THE ELECTRON MICROSCOPE, GIVES THE GRADE, GIVES  
20 THE OVERALL STRUCTURE, LENGTH AND WIDTH, GIVES WHAT TYPE  
21 OF ASBESTOS IT IS, AND SO FORTH, AND THEN TELLS YOU  
22 WHETHER IT IS A MATRIX FIBER OR BUNDLE OR WHATEVER.

23 THESE WERE PRODUCED AT THE DEPOSITION, AND OF COURSE WE  
24 ASCERTAINED AT THE DEPOSITION MR. HATFIELD DID NONE OF  
25 THIS.

26 NOW, WHAT THEY HELD UP HERE WAS SOMETHING  
27 VERY DIFFERENT. THAT IS AN ELEMENTAL READOUT DONE ON AN  
28 ELECTRON MICROSCOPE AS X-RAY DEFRACTION. THAT IS NOT A

1 COUNT OF FIBERS. NOW, I DON'T KNOW WHAT HE DID OVER THE  
2 WEEKEND, BUT WHAT THEY ARE TALKING ABOUT THERE AND WHAT  
3 -- MR. BOUCHER VERY CAREFULLY SEVERAL TIMES USED THE WORD  
4 VERMICULITE -- I ASSUME WHAT THEY DID THERE WAS TO  
5 ANALYZE A PIECE OF THE SUBSTANCE IN ORDER TO ASCERTAIN  
6 WHAT WAS IN THERE AS A MATTER OF CONTENT.

7 THAT IS SOMETHING, OF COURSE, WE HAVE NEVER  
8 HEARD ANYTHING ABOUT FROM THE WITNESS. AND ALL I'M  
9 SAYING IS THAT WHAT IS BEING SHOWN THERE IS NOT THE COUNT  
10 SHEETS. THAT IS A TOTALLY DIFFERENT SCIENTIFIC TEST,  
11 X-RAY DEFRACTION ANALYSIS, THAN SIMPLY LOOKING AT A  
12 PORTION OF ONE OF THESE GRIDS THAT HAS BEEN PREPARED AND  
13 COUNTING THE NUMBER OF ASBESTOS STRUCTURES ON THE GRADE.

14 I JUST WANT TO MAKE SURE THAT THE WITNESS  
15 DOES NOT, WHATEVER WE DO, THE WITNESS DOES NOT GO INTO  
16 THAT WORK BECAUSE IT IS SOMETHING ON WHICH WE HAVE NO  
17 DISCOVERY.

18 THE COURT: WELL, I WOULD TEND TO AGREE THAT ANY  
19 EVALUATION OVER AND ABOVE WHAT WAS DISCLOSED AT THE  
20 DEPOSITION THAT WAS DONE OVER THE WEEKEND BY MR.  
21 HATFIELD, ESPECIALLY AS TO CONTENTS OF THE PRODUCT OR  
22 SAMPLES THAT WAS NOT PREVIOUSLY DISCLOSED, WOULD NOT  
23 APPEAR TO BE IN COMPLIANCE WITH THE DISCOVERY STATUTES  
24 THAT GO INTO THAT MEMO.

25 MR. BOUCHER: WELL, JUST FOR THE RECORD, AGAIN,  
26 YOUR HONOR, WE WEREN'T ATTEMPTING TO GET BEYOND ANY  
27 DISCOVERY STATUTES.

28 AND THE COURT ASKED ME A SPECIFIC QUESTION,

1 AND THAT IS WHETHER OR NOT MR. HATFIELD WAS QUALIFIED TO  
2 ANALYZE UNDER THE T.E.M. ANALYSIS. AND THE EXAMPLE THAT  
3 I SHOWED THE COURT WAS AN X-RAY DISPERSAL ANALYSIS THAT  
4 HE IS QUALIFIED TO ANALYZE. THAT'S THE ONLY REASON FOR  
5 HOLDING THAT UP. AGAIN, THIS IS SIMPLY FOUNDATION. IT  
6 IS NOT ANYTHING OTHER THAN FOUNDATION. BUT WE HAD HIM DO  
7 THAT SIMPLY AS A PRECAUTIONARY MEASURE.

8 THE COURT: WELL, I'M INCLINED TO ALLOW THE  
9 TESTIMONY AT THIS POINT OF THE SAMPLING AND THE SHOWING  
10 OF THE SLIDES REGARDING WHERE THE SAMPLING WAS TAKEN AND  
11 VERIFICATION OF WHATEVER REPORTS HE HAS AS TO HIS  
12 NOTATIONS, AS TO SAMPLE ONE WAS TAKEN FROM X OR WHATEVER  
13 AND PRESERVED IN A CERTAIN WAY, WITHOUT GETTING INTO  
14 WHETHER OR NOT HE SENT IT ANYWHERE, BECAUSE I'M SURE IN  
15 ONE FELL SWOOP HE CAN TESTIFY LATER THAT I TOOK ALL THE  
16 SAMPLES AND BOXED THEM OR WHATEVER I'M SUPPOSED TO DO TO  
17 SECURE THEM AND I SENT THEM TO THE LABORATORY AND I GOT  
18 THE RESULTS BACK.

19 SO WE CAN GO THROUGH THE PHYSICAL SAMPLING  
20 ONLY. I WILL PRECLUDE ANY REFERENCE TO ANY WEEKEND  
21 FURTHER ACTIVITIES BY MR. HATFIELD REGARDING MICROSCOPIC  
22 ANALYSIS OR COUNTS, VERIFICATION OF COUNTS BY HIM  
23 PERSONALLY AT THE LAB. AND I WILL, ONCE WE FINISH THAT  
24 PORTION OF THE TESTIMONY, THEN I'LL BREAK FOR LUNCH AND  
25 I'LL READ THROUGH THE BRIEFS AND HOPEFULLY AT 1:30 MAKE  
26 THE DECISION.

27 MR. BOUCHER: THE OTHER THING I CAN DO, YOUR HONOR,  
28 IS ASK HIM HOW THESE TYPES OF SAMPLES ARE TYPICALLY

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1 WAS FORMED; THAT IS, TO HAVE A LAB AND HAVE LAB  
2 RESULTS.

3 THERE'S NO SHOWING THAT THIS LAB IS ANYTHING  
4 OTHER THAN A LAB THAT PRIMARILY, APPARENTLY, ANALYZES  
5 THINGS OF A MINUTE SUBSTANCE, SUCH AS ASBESTOS AND OTHER  
6 DUST. SO THE ONLY QUESTION THAT MIGHT PRECLUDE THE  
7 BUSINESS RECORDS IS IF THERE WAS SOME OTHER SHOWING OF  
8 UNRELIABILITY. I KNOW THERE'S THE ARGUMENT THAT HAS  
9 BEEN MADE IN WRITING THAT BECAUSE THEY USED THIS CERTAIN  
10 TECHNIQUE IN EVALUATING DUST SAMPLES -- WHICH I'M NOT  
11 GOING TO BORE THE RECORD WITH AGAIN BECAUSE MR. MANFREDI  
12 AND CO-COUNSEL HAVE ELABORATELY PORTRAYED THAT IN THEIR  
13 CROSS-EXAMINATION OF DR. LONGO AND IN ARGUMENT TO THIS  
14 COURT TODAY. SO THAT GOES REALLY TO THE WEIGHT OF THE  
15 EVIDENCE.

16 SO I WOULD ALLOW THE USE OF, NUMBER ONE, THE  
17 BUSINESS RECORDS. I AM ASSUMING THAT NOW. BECAUSE I  
18 ASSUME THAT, THAT MEANS THAT THIS WITNESS MAY GO INTO  
19 GREATER DETAIL AS TO THE EXACT LAB RESULTS THAT HE  
20 RELIED UPON. HOWEVER, THERE SHOULD PROBABLY BE A  
21 LIMITING INSTRUCTION AFTER HIS TESTIMONY ABOUT THE LAB  
22 RESULTS THAT INDICATES THAT HIS REFERENCE TO IT IS NOT  
23 FOR THE TRUTH OF THE MATTER. HOWEVER, WHEN THE BUSINESS  
24 RECORDS COME IN, THEY ARE IN FOR ALL PURPOSES, THE  
25 RESULTS.

26 MR. MANFREDI: DO I UNDERSTAND THAT YOU ARE GOING  
27 TO PERMIT A MAN WHO HAS NOT BEEN ON THE WITNESS LIST,

